In the Court of Appeals of the State of Alaska

Travis Clinton Felder, Appellant, v. **State of Alaska,** Appellee.	Court of Appeals No. **A-12987** **Order** Date of Order: **August 17, 2021**

Trial Court Case No. **3AN-14-05439CR**

The Appellant, Travis Clinton Felder, filed a felony merit appeal challenging three of his nine convictions. In *Felder v. State*, Alaska App. Memorandum Decision No. 6949 (June 9, 2021), this Court affirmed one of those convictions, but reversed the other two, remanding them for a potential new trial.

Mr. Felder was represented by counsel at public expense in this appeal. Under Alaska Appellate Rule 209(b)(5), at the conclusion of any appellate case in which a criminal defendant is represented by court-appointed counsel, the Clerk of the Appellate Courts is directed to "enter judgment against the defendant for the cost of appointed appellate counsel unless the defendant's conviction was reversed by the appellate court." Because Mr. Felder was represented by court-appointed counsel in this appeal, because Mr. Felder's appeal was a felony merit appeal, and because not all of Mr. Felder's convictions were reversed, the Appellate Court Clerk's Office notified Mr. Felder that it intends to enter judgment against him in the amount of $1500.00 for the cost of counsel. *See* Alaska Appellate Rule 209(b)(6).

Mr. Felder objects to the Clerk's notice. Because Mr. Felder objects to the Clerk's intent to enter judgment against him, he is entitled to judicial reconsideration of the Clerk's decision. *See* Alaska Appellate Rule 503(h)(2)(A).

Appellate Rule 209(b)(5) and (6) requires criminal defendants whose convictions are not reversed on appeal to reimburse to the government a portion of the

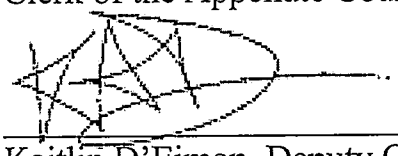
cost of the attorneys who represent them at public expense. In his opposition to the entry of judgment for the cost of appellate counsel, Mr. Felder contends that because he prevailed in having two of the three convictions he challenged reversed, this Court should not enter a judgment for the cost of appellate counsel in this case. In the alternative, he contends that the Court should prorate the amount of the judgment to reflect that this Court reversed two of his most serious convictions.

This Court, however, in circumstances quite similar to Mr. Felder's, has concluded that the exception from attorney's fee should be limited to instances where all of the appealed convictions are reversed. *See* Order dated June 1, 2018, *Cunningham v. State*, Court of Appeals No. A-11731. The Clerk's Office is directed to attach a copy of the *Cunningham* order to this Order.

For the reasons explained in the attached *Cunningham* order, because this Court did not reverse all of Mr. Felder's convictions in this appeal, Mr. Felder is required to reimburse to the government a portion of the cost of the attorney who represented him at public expense. Accordingly, the decision of the Clerk to enter a $1500.00 judgment against Mr. Felder for the cost of counsel under Appellate Rule 209(b) is **AFFIRMED**.

Entered at the direction of Chief Judge Allard.

Clerk of the Appellate Courts



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In the Court of Appeals of the State of Alaska

Jace H. Cunningham,	)	
	)	Court of Appeals No. **A-11731**
Appellant,	)	
v.	)	**Order**
	)	upon Full-Court Reconsideration
State of Alaska,	)	
	)	
Appellee.	)	Date of Order: **06/01/2018**
	)	

Trial Court Case # **1PE-12-00133 CR**

[Before: Chief Judge Mannheimer, Judge Allard, and Superior Court Judge Suddock, *pro tem.* *]

The Appellant, Jace Cunningham, appealed his convictions on two counts of third-degree assault. In *Cunningham v. State*, 408 P.3d 1238 (Alaska App. 2017), this Court agreed with Cunningham that the trial court committed error in its communications with the jury, but we concluded that the trial court's error was harmless with regard to one of Cunningham's convictions. We therefore affirmed one of Cunningham's assault convictions and reversed the other one.

Under Alaska Appellate Rule 209(b)(5), at the conclusion of any appellate case in which a criminal defendant is represented by court-appointed counsel, the Clerk of the Appellate Courts is directed to "enter judgment against the defendant for the cost of appointed appellate counsel unless the defendant's conviction was reversed by the appellate court."

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* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Because Cunningham was represented by court-appointed counsel in this appeal, and because this Court affirmed one of Cunningham's convictions, the Appellate Court Clerk's Office notified Cunningham that it intended to enter judgement against him for attorney's fees in the amount of $1500. *See* Alaska Appellate Rule 209(b)(6).

After Cunningham unsuccessfully asked the Clerk's Office to reconsider, Cunningham sought judicial review of the Clerk's decision. *See* Alaska Appellate Rule 503(h)(2)(A). In his request for judicial review, Cunningham pointed out that this Court agreed with his claim of error, that we reversed one of his convictions, and that we would have reversed his other conviction but for the fortuity that the error was harmless with regard to that conviction. Given these circumstances, Cunningham argued that he should not be required to pay for the approximately 95 percent of his attorney's work that proved successful.

In a single-judge order dated December 28, 2017, Chief Judge Mannheimer rejected Cunningham's argument that an appellate attorney's work is divisible, that it can be separated into successful and unsuccessful parts, and that a defendant should only have to pay attorney's fees based on the unsuccessful portion of their attorney's efforts.

More specifically, Judge Mannheimer rejected Cunningham's argument that a defendant's attorney's fees should be reduced in proportion to the number of successful arguments raised by the defendant's court-appointed lawyer on appeal, or should be reduced proportionately to the amount of time and effort that the court-appointed lawyer devoted to the individual arguments that proved successful on appeal. Rather, Judge Mannheimer concluded that the legislative exception for defendants "[whose] conviction was reversed" should be construed narrowly, applying only to cases where all of the appealed convictions are reversed.

Cunningham now seeks full-court reconsideration of Judge Mannheimer's decision.

The members of the Court have fully considered the arguments raised by Cunningham in his motion for full-court reconsideration, and we now affirm Judge Mannheimer's earlier order.

The language of Appellate Rule 209(b)(5) that directs the Clerk of the Appellate Courts to "enter judgment against [an indigent] defendant for the cost of appointed appellate counsel unless the defendant's conviction was reversed by the appellate court" can be traced back to the legislature's 1990 changes to the statutes governing the costs paid by indigent criminal defendants.

Before the 1990 amendment, the relevant statute — AS 18.85.120(c) — provided that "an indigent person may be ordered to repay the legal expenses and court costs incurred by the state *to the extent that the person is able to do so*." [1] The courts had interpreted this language to mean that, as a prerequisite to ordering a defendant to pay any expenses, the judge had to hold a hearing to determine the extent of the individual defendant's ability to pay. The practical effect of this administrative burden on the court system was that legal costs were virtually never recovered from indigent defendants, regardless of their ability to pay. [2]

Prompted by a request from the court system, the legislature enacted an amended version of AS 18.85.120(c) in 1990 — a version that allowed costs and fees to be imposed without first holding a hearing to assess the defendant's ability to pay. [3]

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[1] Former AS 18.85.120 (pre-1990 version).

[2] *See* Sponsor Statement to Senate Bill 475 by Senator Jan Faiks (March 29, 1990).

[3] SLA 1990, ch. 185, § 1.

At some point during the legislature's consideration of this proposed law, language was added that made the court's authority to enter judgement for costs and fees contingent on the indigent defendant's being convicted. The pertinent part of the amendment read:

> Upon the [indigent] person's conviction, the court may enter a judgment that a person for whom counsel is appointed pay for the necessary services and facilities of representation and court costs ... .

After AS 18.85.120(c) was amended in this fashion in 1990, the court system drafted revisions to Criminal Rule 39 and Appellate Rule 209 that were intended to reflect this legislative change.

To address the "upon ... conviction" language in AS 18.85.120(c), the rules committees inserted the phrase "upon conviction" in Criminal Rule 39 and the phrase "unless the defendant's conviction was reversed by the appellate court" in Appellate Rule 209.[4]

(A separate provision was added to Criminal Rule 39 calling for repayment to the defendant of any costs and fees imposed under Rule 39 if the defendant's conviction was later reversed by the appellate court.)

Based on this legislative history of the statute and the court rules, we affirm the analysis contained in Judge Mannheimer's single-judge order. The policies that prompted the revisions of AS 18.85.120(c) and Appellate Rule 209(b) in the early 1990s lead us to conclude that we should give a narrow construction to the exception in Rule 209(b)(5) for a defendant "[whose] conviction was reversed".

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[4] See Supreme Court Order 1088 (effective July 1, 1992).

Specifically, in cases where a defendant appeals more than one conviction, the exemption from attorney's fees should be limited to instances where all of the appealed convictions are reversed. The amount of attorney's fees specified in Rule 209(b) should not be reduced in cases where some, but not all, of a defendant's convictions are reversed. Nor should the attorney's fees specified in the rule be reduced in proportion to the number of successful arguments raised by the defendant's court-appointed counsel on appeal.

(We believe there is a colorable argument that, in cases where a defendant appeals both felony and misdemeanor convictions, and the felony conviction is reversed, the defendant should pay only the misdemeanor-level attorney's fees specified in Rule 209(b)(6), not the higher felony-level fees.[5] However, that is not the situation in Cunningham's case.)

Admittedly, this means that indigent defendants will have to pay attorney's fees in cases where they prevail on some (perhaps even many) of their appellate claims. It also means that indigent defendants will sometimes have to pay attorney's fees even though their appeal is entirely successful — if the remedy to which they are entitled is something less than outright reversal of their conviction.

But this interpretation of Appellate Rule 209(b)(5) best achieves the legislative purpose of making indigent defendants engage in the same kind of cost-benefit analysis that wealthier defendants must engage in when they decide whether to pursue an appeal.

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[5] *Cf.* Criminal Rule 39(c)(3)(B), which provides that a defendant shall pay costs and fees in the trial court "based on the most serious offense of which the defendant is convicted."

(*See State v. Albert*, 899 P.2d 103, 108 (Alaska 1995), noting that many people who are not completely destitute will nevertheless be "indigent" in the sense that they cannot afford to pay a typical private attorney's retainer.)

This interpretation also best comports with the reality that, win or lose, the defendant has received the significant benefit of legal representation at public expense — and the further reality that the outcome of an appeal bears only a loose correlation to the amount of time and effort that the court-appointed attorney has devoted to the case.

We also note that, if we were to accept Cunningham's "proportion of success" argument, this could have far-reaching consequences for the appellate courts.

For instance, in the present case, Cunningham's attorney asserts that approximately 97 percent of her work was related to the claim that proved successful, while only 3 percent of her work was related to the charge that Cunningham remains convicted of. Based on this, Cunningham argues that he should only have to pay 3 percent of the $1500 attorney's fees specified in Appellate Rule 209(b)(6).

In essence, Cunningham asks this Court to interpret Rule 209(b) as requiring an appellate court to assign a percentage of a court-appointed attorney's work to each of the defendant's individual claims on appeal — and to apportion the attorney's work among the defendant's successful and unsuccessful claims. But Cunningham has not proposed a method that would allow an appellate court to verify the assertions by defense counsel regarding the amount of time and effort that the attorney spent on a defendant's various claims. Cunningham apparently assumes that an appellate court should accept the attorney's estimates at face value.

We conclude that it would be improper for this Court to uncritically accept the attorney's estimates. Under Cunningham's suggested interpretation of Rule 209(b), this Court would be repeatedly required to assess how much to reduce the public's

recovery of the attorney's fees specified in Rule 209(b). To fulfill this duty, this Court would need to institute a verification process — and, potentially, a procedure for conducting adversary hearings in those cases where the Attorney General's Office questioned the court-appointed attorney's assertions.

All of this would amount to a transformation of the fee-setting procedure into something quite different from the procedure envisioned by the legislature when it amended AS 18.85.120(c), and envisioned by the supreme court when it revised Appellate Rule 209(b).

For these reasons, we reject Cunningham's argument that the attorney's fees specified in Appellate Rule 209(b) should be apportioned according to the percentage of the attorney's time and effort devoted to each of the defendant's arguments on appeal, depending on whether those arguments proved successful or unsuccessful.

Although we reject Cunningham's apportionment argument, we note that a defendant has options for seeking relief from a judgement for attorney's fees upon a showing of financial hardship.

The Appellate Rules do not expressly state that a defendant may seek relief from a judgement for attorney's fees on the basis of financial hardship. However, the last sentence of Appellate Rule 209(b)(5) declares that Criminal Rule 39(c)(2) applies to judgements for attorney's fees entered under Appellate Rule 209(b)(5).

Criminal Rule 39(c)(2)(C) expressly authorizes a defendant to ask the court to establish a payment schedule, or to seek a remission, reduction, or deferral of a judgement for attorney's fees entered in the trial court, based on a showing of financial hardship. Because this rule applies to judgements for attorney's fees entered under Appellate Rule 209(b)(5), a defendant has this same right to seek relief on the basis of

financial hardship when the judgement for attorney's fees is entered by an appellate court.

The single-judge order issued on December 28, 2017 is AFFIRMED.

Entered at the direction of the Court.

Clerk of the Appellate Courts

Marilyn May

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